

October 28, 2003

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Ex Parte Notice

Re: Carriage of Digital Television Broadcast Signals, CS Docket No. 98-120
(also CS Docket Nos. 00-96 and 00-2)

Dear Ms. Dortch:

On October 27, representatives of Comcast Corporation met with Catherine Bohigian, Legal Advisor to Commissioner Martin, to discuss the above-captioned proceeding. Comcast was represented by James R. Coltharp, Chief Policy Advisor, FCC & Regulatory Policy, and the undersigned.

Our presentation for the most part tracked previously reported presentations, and we provided Ms. Bohigian with copies of prior Comcast submissions. We discussed the D.C. Circuit's *Bell Atlantic* and *GTE* collocation decisions and opined that these underscore the pains the Commission must take not to overreach in allowing one party to occupy the private property of another. We noted that the Commission's decision on remand from the latter of these two cases allowed requesting carriers to collocate only that equipment for which "the primary purpose and function . . . are to provide the requesting carrier with 'equal in quality' interconnection or 'nondiscriminatory access' to one or more unbundled network elements." *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 16 FCC Rcd. 15435 ¶ 37 (2001). We noted that the logic being suggested as a basis for granting broadcasters digital multicasting must-carry rights (*i.e.*, that several standard-definition digital multicast signals could be transmitted in the same bandwidth as a single high-definition signal) is inconsistent with this decision. Indeed, if the logic being applied in the multicast situation were to have been followed in the collocation remand, the Commission would have adopted a rule that allows collocation of equipment for which "the primary purpose and function . . . are to provide the requesting carrier with 'equal in quality' interconnection or 'nondiscriminatory access' to one or more unbundled network elements *or for any other equipment that does not occupy a greater amount of floor space than the equipment meeting the foregoing criteria.*"

We also discussed approvingly Commissioner Martin's separate statement on the collocation remand order. His concern was that the Commission went too far in using its collocation authority

(section 25(c)(6)) to grant competitive local exchange carriers (“CLECs”) the right to install cross-connects in the central offices of incumbent local exchange carriers (“ILECs”) for CLEC-to-CLEC connections. He observed that the Commission’s approach relied upon the “efficiency” of allowing for such cross-connects and in so doing “strays too far from a statute aimed at connecting CLECs to ILECs” (just as the “requires no more bandwidth” argument for digital multicasting “strays too far” from a statute carefully and narrowly designed to ensure that broadcasters can secure carriage for their “primary video” signal). Several closing sentences from Commissioner Martin’s concurring statement seem equally applicable here:

[T]he Commission should be reluctant to interpret -- or, as here, misinterpret -
- a statute solely to justify a particular policy outcome. The Commission has
a responsibility to execute Congress’s policy choices by fairly and neutrally
reading the statutes it administers.

In the end, such results-oriented decisionmaking is rarely an effective means
of promoting the desired policy or of achieving regulatory stability.

Although the collocation precedents provide a useful prism through which to view the digital must-carry debate, the differences between the two situations are even more telling than the similarities. In the collocation remand, neither the First nor the Fifth Amendment was implicated; ILECs were not being compelled to use a free speech and free press platform to transmit multiple channels of other parties’ programming, and they were being compensated by CLECs for the occupancy of their private property. Must-carry, by contrast, significantly intrudes upon cable operators’ free speech, free press, and property rights, thereby raising serious problems under both the First and Fifth Amendments to the U.S. Constitution. Thus, the must-carry situation makes it all the more essential that the Commission avoid overreaching.

This letter is filed pursuant to Section 1.1206(b)(2) of the Commission’s rules. Please let me know if you have any questions.

Respectfully submitted,

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cc: Catherine Bohigian